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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

11 RETINA ASSOCIATES MEDICAL)
12 GROUP, INC., individually and on)
13 behalf of all others similarly situated,)
14 Plaintiff,)
15 v.)
16 ALLIANCEMED, LLC d/b/a)
17 ALLIANCEMED and DRAYE)
18 TURNER,)
19 Defendants.)
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CLASS ACTION
JUNK-FAX COMPLAINT
JURY TRIAL DEMANDED

Plaintiff Retina Associates Medical Group, Inc., brings this class action under Rule 23 of the Federal Rules of Civil Procedure against Defendants Alliancemed, LLC d/b/a AllianceMed and Draye Turner for its violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA), and the regulations promulgated thereunder.

JURISDICTION AND VENUE

1. This Court has federal question subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 47 U.S.C. § 227.

1 2. Venue in this judicial district is proper under 28 U.S.C. § 1391(b)(2),
2 because a substantial part of the events or omissions giving rise to the claims in this
3 case occurred in this District.

4 3. The Court has personal jurisdiction over Defendants because they
5 conduct business in this state, including substantial business in this district, and
6 Defendants have committed tortious acts within this state, including conversion of
7 fax recipients' paper, ink, and toner.

PARTIES

9 4. Plaintiff Retina Associates Medical Group, Inc., is a citizen of the state
10 of California, with its principal place of business in Orange County, California.

11 5. Defendant Alliancemed, LLC d/b/a AllianceMed (AllianceMed), is an
12 Arizona limited liability company in good standing with the Arizona Secretary of
13 State and has its principal place of business in Phoenix.

14 6. Defendant Draye Turner is an individual who on information and belief
15 resides in Arizona.

16 7. Turner works for AllianceMed as an inside sales representative.

17 8. Defendants, directly or through other persons acting on their behalf,
18 conspired to, agreed to, contributed to, assisted with, or otherwise caused the
19 wrongful acts and omissions, including the dissemination of the junk faxes that are
20 the subject matter of this Complaint.

TH THE TCPA AND CORRESPONDING REGULATIONS

22 9. The Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. 102-
23 243, § 3(a), added Section 227 to Title 47 of the United States Code, 47 U.S.C. §
24 227.

25 10. In pertinent part, 47 U.S.C. § 227(b) provides “[i]t shall be unlawful for
26 any person within the United States, or any person outside the United States if the
27 recipient is within the United States . . . to use any telephone facsimile machine,

1 computer, or other device to send an unsolicited advertisement to a telephone
2 facsimile machine.”

3 11. An “unsolicited advertisement” is defined in the TCPA as “any material
4 advertising the commercial availability or quality of any property, goods, or services
5 which is transmitted to any person without that person’s prior express invitation or
6 permission.” 47 U.S.C. § 227(a)(5). Under TCPA regulations, “[t]he term
7 advertisement means any material advertising the commercial availability or quality
8 of any property, goods, or services.” 47 C.F.R. § 64.1200(f)(1).

9 12. In enacting 47 U.S.C. § 227(b), Congress concluded that a prohibition
10 on unsolicited facsimile advertisements is “the minimum necessary to protect
11 unwilling recipients from receiving fax messages that are detrimental to the owner's
12 uses of his or her fax machine.” S. Rep. No. 178, 102d Cong., 1st Sess. 6 (1991),
13 1991 U.S.C.C.A.N 1969, 1975-76 (emphasis added).

14 13. Accordingly, the amended regulations further provide the additional
15 protection that “[a] facsimile advertisement that is sent to a recipient that has
16 provided prior express invitation or permission to the sender must include an opt-
17 out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.
18 47 C.F.R. § 64.1200(a)(4)(iv).

19 14. Under the TCPA and 47 C.F.R. § 64.1200(a)(3)(iii), the opt-out notice
20 required for all unsolicited facsimile advertisements must meet the following
21 criteria:

- 22 (A) The notice is clear and conspicuous and on the first page of the
23 advertisement;
- 24 (B) The notice states that the recipient may make a request to the
25 sender of the advertisement not to send any future advertisements
26 to a telephone facsimile machine or machines and that failure to
comply, within 30 days, with such a request meeting the
requirements under paragraph (a)(4)(v) of this section is
unlawful;
- 27 (C) The notice sets forth the requirements for an opt-out request
28 under paragraph (a)(4)(v) of this section

(D) The notice includes—

- (1) A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and
 - (2) If neither the required telephone number nor facsimile machine number is a toll-free number, a separate cost-free mechanism including a Web site address or e-mail address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and

The telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week.

15. Senders of unsolicited faxed advertisements must fully comply with the opt-out notice requirements of 47 C.F.R. § 64.1200(a)(4)(iii).

DEFENDANTS' UNLAWFUL COURSE OF CONDUCT

16. Upon information and belief, Defendants have in the past four years systematically and under a uniform policy and procedure sent or arranged to be sent hundreds, or thousands, of fax advertisements, advertising the commercial availability or quality of any property, goods, or services, to fax machines or computers to fax machines throughout the United States, including those of Plaintiff and Class Members, which did not contain an opt-out notice as required by the TCPA.

17. The fax advertisements that Defendants caused to be sent contain preprinted, standardized text and format.

18. Defendants' advertising by fax was not sporadic or unorganized, but instead was part of a well-organized mass advertising tactic and campaign.

19. Each fax advertisement sent to Plaintiff and, upon information and belief, to each Class Member routinely failed to include the opt-out notice required by the TCPA and its regulations.

1 20. An exemplar of one of the fax advertisements that Defendants have sent
2 or caused to be sent to Plaintiff and Class Members is attached hereto as **Exhibit A**.

3 21. Exhibit A identifies Turner and lacks an opt-out notice.

4 22. The opt out-notice must advise that “the recipient may make a request
5 to the sender of the advertisement not to send any future advertisements to a
6 telephone facsimile machine or machines and that failure to comply, within 30 days,
7 with such a request meeting the requirements under paragraph [47 C.F.R. § 64.1200]
8 (a)(4)(v) of this section is unlawful.” See 47 C.F.R. § 64.1200(a)(4)(iii)(B).

9 23. Exhibit A does not include the mandatory disclosure indicating how a
10 recipient must opt out of receiving future facsimile advertisements as set forth in 47
11 C.F.R. § 64.1200(a)(4)(iii)(C) and (4)(v) and does not include “[a] domestic contact
12 telephone number and facsimile machine number for the recipient to transmit such
13 a request to the sender,” as required by 47 C.F.R. § 64.1200(a)(4)(iii)(D)(1)-(2).

14 24. Upon information and belief, Defendants’ sending of the foregoing Fax
15 and others, or Defendants’ causing them to be sent, was conscious and deliberate.
16 Defendants either directly participated in sending the faxes itself or an agent or
17 contractor or third party did so on Defendants’ behalf with Defendants’ knowledge.

18 25. Upon information and belief, Defendants’ sending of the faxes or their
19 causing them to be sent was performed without due care; with reckless disregard
20 concerning the rights and obligations under the TCPA; or when Defendants had
21 reason to know, or should have known, that theirs conduct or the conduct of those
22 acting on their behalf could constitute a violation of the statute.

23 26. Upon information and belief, Defendants’ course of conduct set out
24 above is ongoing and adverse to the public interest and the policies underlying the
25 TCPA. Unless enjoined and restrained by an order of this Court, Defendants will
26 continue to engage in the unlawful acts and practices set out herein. Such actions
27 and conduct by Defendant have violated the TCPA rights of Plaintiff and Class

1 Members and Defendants' duties to them under the TCPA, and unless enjoined by
2 the Court Defendants will continue to aggrieve Plaintiff and Class Members in the
3 future.

4 **FACTS CONCERNING THE REPRESENTATIVE PLAINTIFF**

5 27. Plaintiff still has and had, at all relevant times to this action, telephone
6 facsimile service at (714) 633-7470 at its place of business in Orange, California.
7 Plaintiff receives facsimile transmissions (faxes) at this number, using a telephone
8 facsimile machine (fax machine).

9 28. On or about June 26, 2018, Defendants, without Plaintiff's express
10 invitation or permission, arranged for or caused a telephone facsimile machine,
11 computer, or other device to send an unsolicited fax advertisement, advertising the
12 commercial availability or quality of any property, goods, or services, to Plaintiff's
13 fax machine located at its principal place of business. A copy of the fax
14 advertisement is attached hereto as **Exhibit A** and is incorporated herein by
15 reference.

16 29. **Exhibit A** was unsolicited in that Defendants sent it to Plaintiff without
17 Plaintiff's express invitation or permission. In addition, as stated above, **Exhibit A**
18 lacks the opt-out notice required by the TCPA.

19 **CLASS ACTION ALLEGATIONS**

20 30. Plaintiff brings this class action under Rule 23(a), (b)(2), and (b)(3) of
21 the Federal Rules of Civil Procedure on behalf of itself and of a similarly situated
22 "Class" or "Class Members" defined as:

23 All persons in the United States who (1) on or after four years prior
24 to the filing of this action, (2) were sent a telephone facsimile message
25 of material advertising the commercial availability or quality of any
26 property, goods, or services by or on behalf of Defendants, (3) with
27 respect to whom Defendants cannot provide evidence of prior express
28 invitation or permission for the sending of such faxes, and (4) with
whom Defendants do not have an established business relationship,
and (5) which (a) did not display a clear and conspicuous opt-out
notice on the first page stating that the recipient may make a request

1 to the sender of the advertisement not to send any future
2 advertisements to a telephone facsimile machine or machines and that
3 failure to comply, within 30 days, with such a request meeting the
4 requirements under 47 C.F.R. § 64.1200(a)(4)(v) is unlawful, (b)
5 lacked a domestic contact telephone number for sending the opt-out
6 request, or (b) lacked a facsimile number for sending the opt-out
7 request.

8 Excluded from the Class Defendants, their employees, agents, and
9 members of the federal judiciary.

10 31. This action has been brought and may properly be maintained as a class
11 action against Defendants pursuant to Rule 23 of the Federal Rules of Civil
12 Procedure because there is a well-defined community of interest in the litigation and
13 the proposed Class is easily ascertainable. Plaintiff reserves the right to amend the
14 Class definition if discovery and further investigation reveal that any Class should
15 be expanded or otherwise modified.

16 32. **Numerosity.** At this time, Plaintiff does not know the exact number of
17 Class Members, but among other things, given the nature of the claims and that
18 Defendant's conduct consisted of a standardized fax campaign and widely
19 disseminated standardized fax electronically sent to particular telephone numbers,
20 Plaintiff believes, at a minimum, there are hundreds of Class Members. Plaintiff
21 believes that the Class is so numerous that joinder of all members of the Class is
22 impracticable and the disposition of their claims in a class action rather than
23 incremental individual actions will benefit the Parties and the Court by eliminating
24 the possibility of inconsistent or varying adjudications of individual actions.

25 33. Upon information and belief, a more precise Class size and the
26 identities of the individual members thereof are ascertainable through Defendants'
27 records, including, but not limited to Defendants' fax and marketing records.

28 34. Members of the Class may additionally or alternatively be notified of
the pendency of this action by techniques and forms commonly used in class actions,
such as by published notice, e-mail notice, website notice, fax notice, first class mail,

1 or combinations thereof, or by other methods suitable to this class and deemed
2 necessary or appropriate by the Court.

3 **35. Existence and Predominance of Common Questions of Fact and**
4 **Law:** There is a well-defined community of common questions of fact and law
5 affecting the Plaintiff and members of the Class. Common questions of law or fact
6 exist as to all members of the Class and predominate over the questions affecting
7 individual Class members. These common legal or factual questions include, but are
8 not limited to, the following:

9 (a) Whether Defendants or someone acting on Defendants' behalf sent fax
10 advertisements promoting the commercial availability or quality of any
11 property, goods, or services to Plaintiff and Class Members and the legal
12 relationship between Defendants and any person sending those faxes on its
behalf;

13 (b) Whether the fax advertisements sent to Plaintiff and Class Members
14 were sent via mass or organized advertising campaigns and how Defendants
15 acquired the names and fax numbers of Plaintiff and Class Members;

16 (c) Whether the fax advertisements sent to Plaintiff and Class Members
17 contained the opt-out notice required by the TCPA and its regulations;

18 (d) Whether the fax advertisements sent to Plaintiff and Class Members
19 violate the TCPA and its regulations;

20 (e) Whether Defendants willfully or knowingly violated the TCPA or the
21 rules prescribed under it;

22 (f) Whether Plaintiff and the members of the Class are entitled to statutory
23 damages, treble damages, and attorney fees and costs for Defendants' acts and
conduct;

24 (g) Whether Plaintiff and members of the Class are entitled to statutory
25 damages per facsimile or per violation of the TCPA and its regulations; and

26 (h) Whether Plaintiff and members of the Class are entitled to a permanent
27 injunction enjoining Defendants from continuing to engage in its unlawful
conduct.

1 36. One or more questions or issues of law or fact regarding Defendants'
2 liability are common to all Class Members and predominate over any individual
3 issues that may exist and may serve as a basis for class certification under Rule
4 23(c)(4).

5 37. **Typicality:** Plaintiff's claims are typical of the claims of the members
6 of the Class. The claims of the Plaintiff and members of the Class are based on the
7 same legal theories and arise from the same course of conduct that violates the
8 TCPA.

9 38. Plaintiff and members of the Class each received at least one fax
10 advertisement, advertising the commercial availability or quality of any property,
11 goods, or services, which contained no purported opt-out notice, which Defendants
12 sent or caused to be sent to Plaintiff and the members of the Class.

13 39. **Adequacy of Representation:** Plaintiff is an adequate representative
14 of the Class because Plaintiff's interests do not conflict with the interests of the
15 members of the Class. Plaintiff will fairly, adequately and vigorously represent and
16 protect the interests of the members of the Class and has no interests antagonistic to
17 the members of the Class. Plaintiff has retained counsel competent and experienced
18 in litigation in the federal courts, TCPA litigation, and class-action litigation.

19 40. **Superiority:** A class action is superior to other available means for the
20 fair and efficient adjudication of the claims of the Class. While the aggregate
21 damages which may be awarded to the members of the Class are likely to be
22 substantial, the damages suffered by individual members of the Class are relatively
23 small. As a result, the expense and burden of individual litigation makes it
24 economically infeasible and procedurally impracticable for each member of the
25 Class to individually seek redress for the wrongs done to them. Plaintiff does not
26 know of any other litigation concerning this controversy already commenced against
27 Defendants by any member of the Class. The likelihood of the individual members

1 of the Class prosecuting separate claims is remote. Individualized litigation would
2 also present the potential for varying, inconsistent or contradictory judgments, and
3 would increase the delay and expense to all parties and the court system resulting
4 from multiple trials of the same factual issues. In contrast, the conduct of this matter
5 as a class action presents fewer management difficulties, conserves the resources of
6 the parties and the court system, and would protect the rights of each member of the
7 Class. Plaintiff knows of no difficulty to be encountered in the management of this
8 action that would preclude its maintenance as a class action.

9 41. **Class-Wide Injunctive Relief and Rule 23(b)(2):** Moreover, as an
10 alternative to or in addition to certification of the Class under Rule 23(b)(3), class
11 certification is warranted under Rule 23(b)(2) because Defendants have acted on
12 grounds generally applicable to Plaintiff and members of Class, thereby making
13 appropriate final injunctive relief with respect to Plaintiff and Class Members as a
14 whole. Plaintiff seeks injunctive relief on behalf of Class Members on grounds
15 generally applicable to the entire Class in order to enjoin and prevent Defendants'
16 ongoing violations of the TCPA, and to order Defendants to provide notice to them
17 of their rights under the TCPA to statutory damages and to be free from unwanted
18 faxes.

COUNT I
Telephone Consumer Protection Act
(Violation of 47 U.S.C. § 227)

42. Plaintiff incorporates by reference all of the allegations from above.

22 43. Plaintiff brings this action individually and on behalf of the Class
23 defined above against Defendants for violation of the TCPA and the rules prescribed
24 under it by the FCC.

25 44. At all times material to this action, Defendants were each a person that
26 used or caused to be used a “telephone facsimile machine, computer, or other device”

1 to send, to a “telephone facsimile machine” an “unsolicited advertisement” or an
2 “advertisement” within the meaning of the TCPA and its regulations.

3 45. Defendants sent or caused to be sent hundreds or thousands of these
4 advertisements exemplified by Exhibit A. Plaintiff and each Class Members
5 received at least one of them.

6 46. Each of the foregoing advertisements violated the TCPA because they
7 failed to contain the opt-out notice required by 47 U.S.C § 227(b)(1)(C)(iii); 47
8 C.F.R. § 64.1200(a)(4)(iv); and 47 C.F.R. § 64.1200(a)(4)(iii).

9 47. Accordingly, Plaintiff and the members of the Class are entitled to
10 statutory damages under 47 U.S.C. § 227(b).

11 48. If it is found that Defendants willfully or knowingly sent or caused to
12 be sent fax advertisements to Plaintiff and the members of Class in violation of the
13 TCPA, Plaintiff requests an increase by the Court of the damage award against
14 Defendants, described in the preceding paragraph, to three times the amount
15 available under 47 U.S.C. § 227(b)(3)(B), as authorized by 47 U.S.C. § 227(b)(3)
16 for willful or knowing violations.

17 49. Furthermore, Plaintiff and members of the Class are entitled to an order
18 enjoining Defendants’ violations of the TCPA under 47 U.S.C. § 227(b), because:
19 Defendants have violated their TCPA rights and Defendants’ duties owed to them
20 under the statute; Defendants’ violations continue and will continue to violate the
21 statutory rights of Plaintiff and Class Members and others in the future; there is no
22 fully adequate remedy at law for Defendants’ conduct; irreparable injury will be
23 suffered unless an injunction is issued to stop Defendants from violating the TCPA;
24 any potential injury to Defendants attributable to an injunction is outweighed by the
25 injury that Plaintiff and Class Members and the public will suffer if such injunction
26 is not issued; and the injunction would not be adverse to the public interest.

27

28

1 **WHEREFORE**, Plaintiff, for itself and all others similarly situated, demands
2 judgment against Defendants, jointly and severally, as follows:

- a. certify this action as a class action and appoint Plaintiff as Class representative;
 - b. appoint the undersigned counsel as Class counsel;
 - c. award damages of \$500 per TCPA violation per facsimile pursuant to 47 U.S.C. § 227(a)(3)(B);
 - d. award treble damages up to \$1,500 per TCPA violation per facsimile pursuant to 47 U.S.C. § 227(a)(3);
 - e. enjoin Defendants and their contractors, agents, and employees from continuing to send TCPA-violating facsimiles pursuant to 47 U.S.C. § 227(a)(3)(A);
 - f. award class counsel reasonable attorneys' fees and all expenses of this action and require Defendants to pay the costs and expenses of class notice and claim administration;
 - g. award Plaintiff an incentive award based upon its time expended on behalf of the Class and other relevant factors;
 - h. award Plaintiff prejudgment interest and costs; and
 - i. grant Plaintiff all other relief deemed just and proper.

JURY DEMAND

Plaintiff requests a trial by jury.

DOCUMENT PRESERVATION DEMAND

Plaintiff demands that Defendant take affirmative steps to preserve all records, lists, electronic databases, or other itemization of telephone or fax numbers associated with the Defendants and the communication or transmittal of advertisements as alleged herein.

1 DATED: September 14, 2018 EDWARDS POTTINGER LLC

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3 By: /s/ Seth M. Lehrman
4 Seth M. Lehrman
5 Attorney for Plaintiff
6 RETINA ASSOCIATES MEDICAL GROUP,
7 INC.
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